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NO. 88-1478

In The Supreme Court of the United States October Term, 1988

CORPUS CHRISTI TAXPAYERS ASSOCIATION, TOM HUNT, and JOE O'BRIEN,
Petitioners,

v.

CITY OF CORPUS CHRISTI, and STATE OF TEXAS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT STATE OF TEXAS' BRIEF IN OPPOSITION TO CERTIORARI

JIM MATTOX
Attorney General of Texas

LOU McCREARY
Executive Assistant
Attorney General

MARY F. KELLER
First Assistant
Attorney General

WILLIAM DUKE KIMBROUGH*
Assistant Attorney General

P. O. Box 12548
Austin, Texas 78711-2548
512/463-2002

April, 1989
*Attorney of Record

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JURISDICTION

The court should not take jurisdiction because:

a. The decision of the Court of Appeals for the Fifth Circuit does not conflict with the decision of another federal court of appeals on the same matter, nor does the decision conflict with that of a state court of last resort. The decisions uniformly hold that a state cannot be sued in federal district court for alleged violations of 42 U.S.C. § 1983.

b. The question whether a state can be sued in federal court for an alleged violation of § 1983 is settled

by this Court, so answering this question is not a reason for granting review in this Court.

c. The federal court of appeals has decided the question whether a state can be sued in federal court for an alleged § 1983 violation in accordance with the decisions of this Court, so there is no reason to review this case because of a supposed conflict with a decision of this Court.

STATEMENT OF THE CASE

Respondent disagrees with Petitioners' statement that it is undisputed that Petitioners were denied a hearing by the Corpus Christi City Council. The City of Corpus Christi offered evidence in state court that all required public hearings were held. (Petitioners' Appendix, Affidavit of Juan Garza, p. 41). Petitioners did not offer any controverting summary judgment proof. (Petitioners' Appendix, Texas Court of Appeals Opinion, p. 23). Therefore, Respondent submits that there is no support in the record for Petitioners' statement that Petitioners were denied a hearing by the Corpus Christi City Council.

Having failed to secure a favorable result in state court proceedings, Petitioners filed suit in federal district court seeking substantially the same relief as they sought in state court against the City of Corpus Christi, and in addition claiming that the State of Texas violated their civil rights in that the judges in the Texas court system made the wrong decisions.

The United States District Court dismissed the complaint; this was affirmed by the United States Court of Appeals in an unpublished opinion.

QUESTION PRESENTED

Can a taxpayers association sue the State of Texas in federal district court for violation of 42 U.S.C. § 1983?

REASONS FOR DENYING THE WRIT

There is no conflict in the decisions.

The Fifth Circuit Court of Appeals stated in its opinion below:

> However, the State is clearly immune from federal court suit under the Eleventh Amendment and is not a "person" for purposes of section 1983.

(Petitioners' Appendix, Court of Appeals Opinion, p. 7).

This holding presents no conflict with the decisions on the point. It is well settled that a state is immune from suit in federal district court unless it has given consent. *Employees of Dept. of Public Health & Welfare v. Missouri*, 411 U.S. 279, 93 S.Ct. 1614 (1973).

The State of Texas is not a person within the meaning of 42 U.S.C. § 1983; therefore it cannot be sued in federal district court for alleged violations under § 1983. *Vick v. Texas Employment Commission*; 514 F.2d 734 (5th Cir. 1975).

Even if the complaint could be amended to name the offending Texas jurists as parties defendant the district court would not have jurisdiction. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1967); *Cheramie v. Tucker*, 493 F.2d 586, 589 (5th Cir.), *cert. denied* 95 S. Ct. 126 (1974). Finally, there seems to be no

authority, and Petitioners cite none, to support the proposition that, having lost their suit in state court against the City of Corpus Christi, the Petitioners can sue the State of Texas in federal district court under 42 U.S.C. § 1983 for making the wrong decisions.

Petitioners cite no cases in conflict.

The State of Texas offers the following discussion of cases cited by Petitioners to show that none of these cases has decided this question in a way that conflicts with any decision by this Court, by a federal court of appeals, or by a state court of last resort.

The jurisdiction of the United States Supreme Court in *Peralta v. Heights Medical Center*, 108 S. Ct. 896 (1988), a case cited by Petitioners, was invoked by direct appeal to the Supreme Court from the decisions of the Texas court, as allowed by 28 U.S.C. § 2101(c). The instant case is not at all like this, because here Petitioners initially filed suit in federal district court instead of petitioning the United States Supreme Court following a final decision in state court.

Petitioners cite five other cases that came directly to this Court either by appeal or by writ of certiorari from state court, so these cases are not authority that a § 1983 suit against the state can be initiated in federal district court. These cases are: *Londoner v. Denver*, 210 U.S. 373, 28 S.Ct. 708, (1907); *Arkansas Writer's Project v. Ragland*, 107 S.Ct. 1722 (1986); *Davis v. Wechsler*, 263 U.S. 22, 44 S.Ct. 13 (1923); *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 52 S.Ct. 556 (1932); and *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961). None of these cases is in conflict with the decision of the Court of Appeals in this case; in fact, *Monroe v. Pape*, *supra*, tends to support it.

Three of the cases cited by Petitioners are *Pennzoil v. Texaco*, 107 S.Ct. 1519 (1987); *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643 (1941); and *District of Columbia Court of Appeals. v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303 (1983). None of these cases is authority for Petitioner's claim that the United States District Court has original jurisdiction of a § 1983 action against a state. In *Pullman, supra*, this court remanded the cause to the United States District Court to await the outcome of state court proceedings "to be brought with reasonable promptness." In *Pennzoil v. Texaco*, *supra* and *Feldman*, *supra*, this Court found that the federal district court had no jurisdiction over a judicial inquiry that originated in state court.

Finally, if these decisions impinge at all on the issues decided by the Court of Appeals, they only lend further support to the decision of the Court of Appeals; certainly, there is no conflict.

Petitioners have not demonstrated that the question is important.

The Court of Appeals determined that its opinion should not be published because of the local rule against "publishing opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law". Respondent submits that this is an accurate assessment of the importance of this case to the general public; therefore, this case presents no important question for review by this Court.

CONCLUSION

For these reasons, and for the reasons stated in the opinions below, the application for writ of certiorari should be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

LOU McCREARY
Executive Assistant Attorney

HARRIET D. BURKE
Assistant Attorney General
Chief, Taxation Division

WILLIAM DUKE KIMBROUGH*
Assistant Attorney General
Texas Bar Card No. 11426000

P. O. Box 12548
Austin, TX 78711-2548
512/463-2002

ATTORNEYS FOR RESPONDENT
THE STATE OF TEXAS

April, 1989
*Attorney of Record